UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CLAYTON R. SEAVEY,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 00-23-B***
	)	
KENNETH S. APFEL, Commissioner	***)***	
Of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Supplemental Security Income ("SSI") and Social Security Disability ("SSD") appeal raises the question whether the commissioner erred in relying on 20 C.F.R. Part 404, Subpart P, Appendix 2, Table 2 ("the Grid") to determine that the plaintiff was not disabled. I recommend that the court reverse the commissioner's decision as to SSI only.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs*., 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff met the disability insured status requirements of the Social Security Act on December 15, 1990, the date on which he stated he became unable to work, and had sufficient quarters of coverage to remain insured only through December 31,

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on October 5, 2000 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

1995, Finding 1, Record at 19; that he had not engaged in substantial gainful activity since December 15, 1990, Finding 2, *id*.; that he suffered from chronic low back pain, a severe impairment that did not meet or equal the criteria of any of the impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 ("the Listings"), Finding 3, *id*.; that he lacked the residual functional capacity to lift and carry more than 20 pounds, Finding 5, *id*.; that he was unable to perform his past relevant work as a lumber mill worker, factory worker and blueberry, fish and peat bog laborer, Finding 6, *id*.; that he had no significant non-exertional limitations that narrowed the range of work he was capable of performing, Finding 7, *id*.; that given his age (38), limited education, unskilled work experience, and exertional capacity for light work, application of 20 C.F.R. §§ 404.1569 and 416.969 and section 202.17 of the Grid directed a conclusion that the plaintiff was not disabled, Findings 8-11, *id*. at 19-20; and that he has not been under a disability as defined in the Social Security Act at any time through the date on which his insured status expired or at any time through the date of the decision, Finding 12, *id*. at 20. The Appeals Council, noting that it had considered additional evidence submitted by the plaintiff's attorney after the hearing before the administrative law judge, declined to review the decision, *id*. at 5-6, making it the final decision of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs*., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

Discussion

A. Social Security Disability ("SSD") Claim

The itemized statement of errors submitted by the plaintiff does not differentiate between his claims for SSD and SSI. However, SSD is available only if the disability was present while the plaintiff was insured, 20 C.F.R. § 404.131(b), and accordingly the plaintiff in this case must demonstrate the existence of a disability on or before December 31, 1995, the date upon which he was last insured for this purpose.

The plaintiffs' statement of errors relies on the reports of Melodie Greene, Ph.D., a psychologist who evaluated the plaintiff in 1996 and 1997, Record at 221, 262, to support his argument that the administrative law judge failed to address his "documented mental impairment" of learning disabilities, borderline IQ and personality disorder, making the use of the Grid inappropriate.[2] Plaintiff's Itemized Statement of Errors ("Statement of Errors") (Docket No. 5) at 3-4.[3] Nothing in Dr. Greene's reports, however, can reasonably be construed to constitute a finding that any mental impairment existed before December 31, 1995. Accordingly, the lack of medical

[2] The fact sheet filed by the plaintiff also lists "right shoulder bursitis" as a disease upon which his claim is based, Fact Sheet for Social Security Appeals (Docket No. 5) ¶ 8, but no reference is made to this basis for recovery in the statement of errors, and it accordingly will not be considered further.

[3] The plaintiff also asserts, in conclusory fashion, that "[h]aving found that his back pain is a severe impairment that renders him unable to perform his previous work, the ALJ cannot simply ignore it and rely on the Grid to find plaintiff disabled. If the effects of the back pain are significant enough to justify a finding that he cannot return to his previous work, it follows that they are significant enough to limit the range of light work he can perform." Statement of Errors at 3. This argument is based on a misunderstanding of the sequential evaluation process. The administrative law judge found the back pain, an exertional impairment, to be sufficient to limit the plaintiff to light work, making a return to his past relevant work, all of which was classified at a higher exertional level, impossible. The administrative law judge found that the plaintiff was capable of a full range of light work; he must therefore have found that the back pain did not limit the range of light work that the plaintiff could perform. The relevant question when the Grid is applied is whether there are any nonexertional impairments that limit the range of work at the specified exertional level. *Rose v. Shalala*, 34 F.3d 13, 19 (1st Cir. 1994). The fact that a claimant is found to have a significant exertional impairment that prevents his return to past relevant work does not and cannot, standing alone, mean that he also cannot perform the full range of work at the exertional level which the administrative law judge finds appropriate given that impairment.

evidence in the record to support the limitations upon which the plaintiff relies with respect to his application for SSD benefits means that he cannot recover those benefits. 20 C.F.R. §§ 404.1527-404.1529.

B. Supplemental Security Income ("SSI") Benefits

Dr. Greene found in her initial evaluation of the plaintiff, which was not performed for the purposes of his application for Social Security benefits, that he had a passive-aggressive personality disorder and that borderline intellectual functioning and an avoidant personality disorder could not be ruled out. Record at 234. She later stated that "[a]s his intelligence and achievement testing results suggest, [the plaintiff] would have great difficulty performing any jobs that require much reading." *Id.* at 261. After testing, she assigned him IQ scores of 78 verbal, 86 performance and 81 full scale. *Id*. at 263. The first score is in the borderline range and the latter two in the low average range. *Id*. Dr. Greene concluded that the plaintiff "may meet the DSM-IV diagnostic criteria for Reading Disorder." *Id*. at 264.

Dr. Greene's initial report was submitted during the hearing. List of Exhibits at 2 (Exhibit 14F), Record at 2, 23, 47. At the hearing, the administrative law judge stated "[t]here's no evidence that there's anything of a disabling nature in his psychological profile in this report," *id*. at 47, and there is no mention of any possible mental impairment in the administrative law judge's decision. With respect to nonexertional limitations, however, the relevant question throughout the sequential evaluation process is not merely whether that limitation itself is disabling but also whether that limitation may limit the range of work that the claimant is able to perform. This is particularly true when the administrative law judge applies the Grid. The Grid "can only be applied when claimant's non-exertional limitations do not significantly impair claimant's ability to perform at a given exertional level." *Rose*, 34 F.3d at 19. "If a non-strength impairment, even though considered

significant, has the effect only of reducing [the] occupational base marginally, the Grid remains highly relevant and can be relied on exclusively to yield a finding as to disability." *Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 524 (1st Cir. 1989). Here, the only medical evidence in the record states that the plaintiff's "personality problems will likely interfere with" his ability to adequate provide for his children, Record at 234, that he "would have great difficulty performing any jobs that require much reading," *id*. at 261, and that he may have a reading disorder, *id*. at 264.[4] These undisputed medical[5] conclusions strongly suggest a reduction in the range of light work that could be more than marginal. Accordingly, the use of the Grid in this case, with no evaluation of the possibility that the plaintiff's identified mental limitations could erode the light work occupational base, constitutes error by the commissioner. In other words, there is no substantial evidence to support the administrative law judge's conclusion that there were no significant nonexertional limitations on the plaintiff's capacity to perform the full range of light work. *See generally Foreman v. Callahan*, 122 F.3d 24, 26 (8th Cir. 1997) (insufficient evidence to support administrative law judge's conclusion that mental impairment was not significant with respect to use of Grid where claimant had IQ in mid-70s, borderline intellectual functioning, learning disability and very limited ability to read and write); *Cookemboo v. Apfel*, 983 F. Supp. 1274, 1279 (E.D.Mo. 1997) (administrative law judge improperly relied on Grid without addressing plaintiff's alleged depression and physicians' prescriptions for two drugs used to treat anxiety; testimony of

[4] It is not clear from the administrative record whether Dr. Greene's later reports, dated September 4, 1997, Record at 261-64, were before the administrative law judge, whose decision is dated November 26, 1997, *id*. at 20. The Appeals Council suggests that they were not, identifying them as Exhibit AC-2 and listing them as "[e]vidence in addition to that which was before the Administrative Law Judge," Order of Appeals Council, *id*. at 7. A letter from the plaintiff's attorney to the Appeals Council suggests that the reports were submitted to the administrative law judge. *Id*. at 10. Counsel for the plaintiff stated at oral argument that she believed the reports were submitted to the administrative law judge in accordance with his direction at the hearing. *Id*. at 47-48 (additional material to be submitted by September 10, 1997). Counsel for the commissioner deferred to his opponent's representation, but maintained that the administrative law judge had not seen them. For purposes of this recommended decision, I conclude that the reports were timely submitted and therefore should have been reviewed by the administrative law judge.

[5] A licensed or certified psychologist is an acceptable medical source. 20 C.F.R. § 416.913(a)(3).

vocational expert required).

When a claimant's nonexertional limitations have more than a marginal effect, the testimony of a vocational expert is required. *Burgos Lopez v. Secretary of Health & Human Servs.*, 747 F.2d 37, 42 (1st Cir. 1984). For all that appears in this record, such testimony was required. The failure to consult a vocational expert in this case occurred at Step 5 of the evaluative process, where the burden of proof rests with the commissioner. *Goodermote*, 690 F.2d at 7. As this court has repeatedly held, the commissioner's failure to carry his burden at Step 5 requires remand for payment of benefits.[6] *E.g., Field v. Chater*, 920 F. Supp. 240, 245 (D. Me. 1995).

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the cause **REMANDED** with directions to award benefits to the plaintiff on his claim for Supplemental Security Insurance benefits and otherwise **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 6th day of October, 2000.

[6] Counsel for the commissioner contended at oral argument that the error, if any, occurred at Step 4 rather than Step 5 because the matter at issue was really the plaintiff's residual functional capacity. I disagree, for the reasons set forth above.

David M. Cohen
United States Magistrate Judge

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